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Supreme Court of the United States

OCTOBER TERM, 1950

No. 725

NICK TEDESCO,

Appellant,

versus

BOARD OF SUPERVISORS OF ELECTIONS FOR THE PARISH OF ORLEANS, ET AL.,

Appellees.

BRIEF OF APPELLANT OPPOSING MOTION OF APPELLEES TO DISMISS OR AFFIRM

GEORGE A. DREYFOUS.
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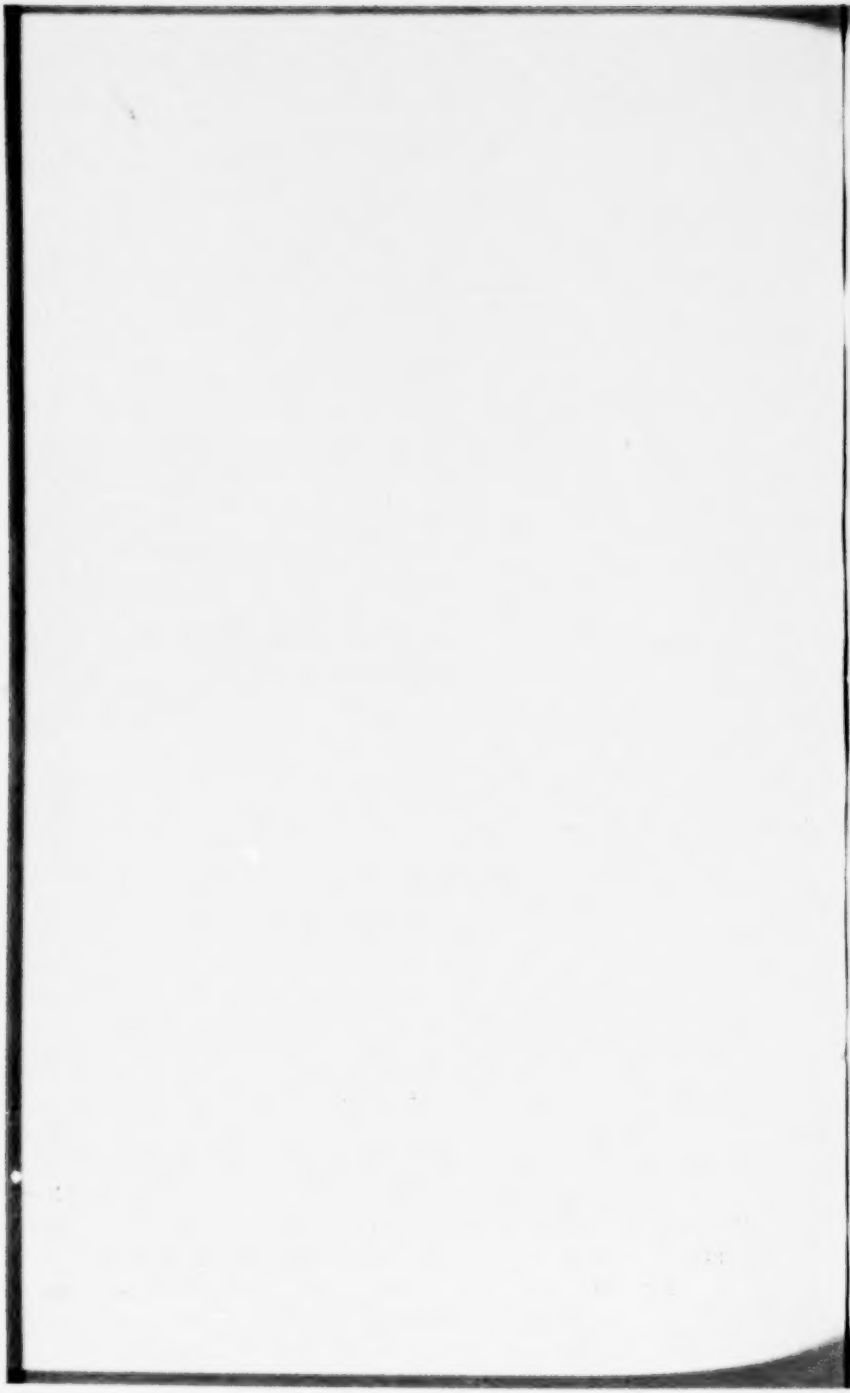

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No. .....

NICK TEDESCO,

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versus

BOARD OF SUPERVISORS OF ELECTIONS FOR THE PARISH OF ORLEANS, ET AL.,

Appellees.

BRIEF OF APPELLANT OPPOSING MOTION OF APPELLEES TO DISMISS OR AFFIRM

To the Supreme Court of the United States:

STATEMENT CONCERNING STATUTES ADOPTED BY STATE OF LOUISIANA

Appellant seeks a declaratory judgment holding that Act 234 of the Regular Session of 1948 of the Legislature of the State of Louisiana is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States and, consequently, is void.

The said act, which will hereinafter be referred to as Act 234 of 1948 purports to amend Act 159 of the Regular Session of 1912 of the Legislature of the State of Louisiana (as amended by Act 338 of 1936), hereinafter referred to as the City Charter.

Act 234 of 1948 provides the manner in which a Mayor and Commissioners shall hereafter be elected and the manner in which the Commission Council and the various Departments, into which the City government is divided, will function. This act provides that the next election of the municipal officers shall be held on the Tuesday following the first Monday in April, 1950, and the officers then elected shall serve for a term of four years, and their successors shall be elected on the Tuesday following the first Monday in April, 1954, and thereafter said election shall take place every four years, and the Mayor and Commission Councilmen thereat elected shall assume charge of the offices to which they have been elected on the first Monday in May following their election.

The Uniform Declaratory Judgments Act, under which relief is sought by appellant, was adopted by Act 22 of the Extraordinary Session of 1948 of the Legislature of the State of Louisiana.

Act 234 of 1948 is published in Acts, State of Louisiana, Regular Session of 1948 at page 574 and the Uniform Declaratory Judgments Act, as adopted in Louisiana is published in Acts, State of Louisiana, Extraordinary Session of 1948 at page 56.

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The provisions in Act 234 of 1948 against which appellant seeks relief are as follows:

The provision that one Commissioner shall be elected from and by the electors of each of the seven districts into which the City is divided.

The provision that Commissioners elected from and by the electors of part of the City shall singly exercise executive governmental functions throughout the City.

SUMMARY OF APPELLEES' CONTENTIONS

In their motion for dismissal of this appeal or for affirmance of the judgment appealed from, appellees rely upon six principal points, to-wit:

1. That the contentions of appellant will become moot before a decision upon the merits can be reached by this Court.

2. That this is an appeal to this Court to reconstruct the electoral process of a municipality to provide that each voter may have an equal vote in choosing the councilmen of the City.

3. That appellant makes no complaint of discrimination forbidden by the Fifteenth or Nineteenth Amendments. He depends upon an assertion that the right to vote for all elective officials of a municipality is a privilege or immunity of national citizenship protected by the Fourteenth Amendment.

4. That no substantial federal question can be made to rest on the exercise by the State of its power to provide for elections by districts instead of at large.

5. That appellant's complaint is not supported by the four cases upon which he relies, *Nixon v. Herndon, United States v. Classic, Smith v. Allwright* and *Colegrove v. Green.*

6. That the record discloses no real and substantial Federal question not already settled adversely to appellant's contentions.

SUMMARY OF APPELLANT'S CONTENTIONS

In opposition to these contentions, counsel for appellant shows:

1. That the act complained of provides not only for the election which will be held in April, 1950, but also for future elections to be held in April, 1954 and every four years thereafter.

2. That this is not an appeal to this Court to reconstruct the electoral process of a municipality. A finding that Act 234 of 1948 is void will leave the City Charter, as it existed prior to the enactment of said act, in full force and effect.

3. That appellant relies not only upon the first clause of the second sentence of Section 1 of the Fourteenth Amendment, but upon the entire section.

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4. That appellant does not question the power of the State to provide for elections by districts to an assembly or tribunal which acts as a unit and reaches decisions by a majority vote. Appellant does question the right and power of the State to provide for the election of an official from one district to administer the government of another district. For example, appellant contends that a statute would be invalid which should provide for the division of a city into seven districts and for the election of the Mayor by the voters of one of these districts. Each of the Commissioners of the City of New Orleans exercises some of the executive powers, usually vested in the Mayor under an aldermanic form of government.

5. That appellant's complaint is supported by the four cases mentioned and by other decisions.

6. That the record discloses seven substantial Federal questions not settled adversely to appellant's contentions.

APPELLANT'S CONTENTIONS

I.

The effects of Act 234 of 1948 are prospective beyond the election to be held in April, 1950.

In the cases cited in appellees' motion under point I injunctive relief was sought against action in a specific election. These cases did not reach the Supreme Court of

the United States in time to prevent the thing complained of being done. In *Love et al. v. Griffith*, 266 U. S. 32, 45 S. Ct. 12, one of these cited cases, injunction was sought against preventing negroes from voting in a Democratic primary. Relief was denied by the trial court on the ground that the Fifteenth Amendment had not been infringed. An appeal was dismissed by the Texas Court of Civil Appeals on the ground that the cause of action had ceased to exist. On writ of error to this Court, the decree of the Court of Civil Appeals was affirmed. Nevertheless, in the opinion of the Court delivered by Justice Holmes, it was declared that: "If the case stood here as it stood before the Court of first instance it would present a grave question of constitutional law, and we should be astute to avoid hindrances in the way of taking it up." It was noted that the decision of the Appellate Court was on a different ground, not involving constitutional rights.

In the present cause, reported below at 43 So. 2d 514 (La. App. 1949), no injunctive relief is sought. A declaratory judgment will be effective when it is rendered. This appeal is taken from a judgment which decides adversely appellant's claims that his constitutional rights were infringed and continue to be infringed by an act of the State Legislature.

II.

This is not an appeal to this Court to reconstruct the electoral process of a municipality.

In *Colegrove v. Green*, 328 U. S. 549, 66 S. Ct. 1198, the vote of Justice Rutledge was required to constitute a majority decision. He held with the dissenting justices

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that the issues were justiciable, constituting with them, on this issue. a majority of the Court. He concurred in the result so that a decision was reached not to attempt to grant relief, no relief being available which would not have involved difficulties which he deemed too great to warrant equitable relief. The Louisiana statute does not present this difficulty. Election at large had already been provided as the method of selecting Commissioners under the City Charter. This was the universal method of electing Commissioners having functions similar to those exercised under the New Orleans City Charter. It is conceded that the Legislature of the State of Louisiana has power to abolish the Commission government of the City of New Orleans and to adopt an aldermanic form of government for the City, with the division of the City into districts. However, appellant claims that the Legislature would be required by Section 1 of the Fourteenth Amendment to adopt some reasonable method of districting the City in proportion to the population. In the *Colegrove* case the districting of the state had been equitable when originally provided, but had become inequitable because of shifts in the distribution of the population during a period of years. The Court refused to assume the burden of reconstructing the districts. Act 234 of 1948 undertakes an original districting of the City of New Orleans in a manner which abridges appellant's privileges and immunities; deprives him of liberty and property and denies him the equal protection of the laws. It is not sought to have new districts established by the Court. The granting of the relief sought by appellant would leave the Legislature with the alternatives of maintaining the City Charter undisturbed or of making a revision within its constitutional limitations.

III.

Act 234 of 1948 contravenes Section 1 of the Fourteenth Amendment.

The constitutional issues urged in this case were not raised in the suit filed by the City of New Orleans against the defendants in this suit, which was decided by the decision of the Supreme Court of Louisiana. *City of New Orleans v. Board*, 43 So. 2d 237.

It would appear to be fruitless to consider decisions rendered before *Nixon v. Herndon*, 273 U. S. 536, 47 S. Ct. 446 (1926). In *Minor v. Happersett*, 88 U. S. 162 (1874) the Court held that the privileges or immunities clause of the Fourteenth Amendment did not extend the right of suffrage to women; the Court held that the qualifications of voters were determined by the States. It did not hold that a state could arbitrarily classify citizens or establish arbitrary qualifications. In *United States v. Reese et al.*, 92 U. S. 214, a demurrer to a criminal charge was sustained, it being held that Congress had not provided for the punishment of the offenses charged in the indictment. In *United States v. Cruikshank et al.*, 92 U. S. 542 (1875) the Court held that the Fourteenth Amendment does not extend protection against unlawful conduct of individuals. In *Mason v. Missouri*, 179 U. S. 328 (1900) it was held that the classification of cities according to their population was within the discretion of the General Assembly. These decisions can neither add to nor subtract from the weight of *Nixon v. Herndon*.

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In *Breedlove v. Suttles*, 302 U. S. 277, 58 S. Ct. 205 (1937) this Court held the levying of a poll tax upon men between the ages of 21 and 60 was not an unreasonable classification. The Court considered the special conditions affecting minors, men over sixty and women. The statement of the Court that:

> "Privilege of voting is not derived from the United States, but is conferred by the state and, save as restrained by the Fifteenth and Nineteenth Amendments and other provisions of the Federal Constitution, the state may condition suffrage as it deems appropriate."

is not adverse to the claims asserted by appellant. Appellant's contentions are based upon the Fourteenth Amendment, which was not applicable to the facts in *Breedlove v. Suttles* because of the reasonableness of the State's classification in that case.

IV.

Electors have the privilege of voting for the executive officials who govern the communities in which they reside.

No instance has been found of a previous attempt by a legislative assembly in the United States to provide that an executive with power to act alone should be elected from part of the area which he is to govern. The closest analogy is a New York statute considered in *John F. Rathbone et al. v. Jacob Wirth, Jr. et al.*, 150 N. Y. 450, 34 L. R. A. 408. The statute in question provided a police board to be selected by the members of the city council of the City of

Albany, each member of the council casting one vote and the four persons receiving the highest number of votes to be police commissioners, provided that not more than two of these commissioners should belong to the same political party. This statute was held invalid under the New York Constitution. Inasmuch as no similar statute has been considered by this Court, there has been no decision of this Court upon points I and II relied upon by appellant, as set forth in the definite statement filed in accordance with Supreme Court Rule 13, Paragraph 9.

V. and VI.

Substantial federal questions are raised.

In *Nixon v. Herndon et al.*, 273 U. S. 536, this Court held that it was unnecessary to consider the Fifteenth Amendment because the deprivation of the right to an effective vote was an obvious infringement of the Fourteenth Amendment. The complaint in that case was that the right to vote in an election was ineffective when accompanied by an exclusion from the Democratic primary.

In *United States v. Classic*, 313 U. S. 299, 61 S. Ct. 1031, the right to vote had been rendered ineffective by a fraudulent count of the votes.

In the present case appellant's vote has been rendered ineffective by the discriminations enacted by Act 234 of 1948.

No case is referred to in the motion to dismiss or affirm which has settled adversely the Federal question raised by appellant.

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Appellant respectfully submits that the motion to dismiss or affirm filed by appellees should be denied on all grounds and that this Honorable Court should accept and note jurisdiction of this appeal.

Respectfully submitted,

GEORGE A. DREYFOUS,

Counsel for Appellant.

This is to certify that copies of this brief have been served on opposing counsel on this the third day of April, 1950.

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